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No. 87-179

# In the Supreme Court of the United States

OCTOBER TERM, 1987

TONY SCOTT TRUCKING, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board erred in finding that the Union did not impermissibly interfere with the free choice of petitioner's employees in their selection of a bargaining representative and therefore that petitioner violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), by refusing to bargain with the Union.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 821 F.2d 312. The decision and order of the National Labor Relations Board (Pet. App. 11a-19a) are reported at 277 N.L.R.B. No. 155. The decision and order of certification of the National Labor Relations Board (Pet. App. 20a-21a), and the hearing officer's report on the objections to the election (Pet. App. 22a-35a), are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 28, 1987. A petition for a writ of certiorari was filed on July 27, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner, Tony Scott Trucking, Inc., hauls materials, supplies, and equipment for use by other companies in road construction work (Pet. App. 13a). On July 11, 1984, the General Drivers, Warehousemen and Helpers, Local No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), filed a petition with the National Labor Relations Board seeking certification as the exclusive bargaining representative of a stipulated unit of drivers and mechanics employed at petitioner's Bowling Green, Kentucky, facility (*id.* at 2a, 22a). On September 6, 1984, the Board conducted a secret ballot election among the employees in the unit, a majority of whom voted in favor of representation by the Union (*ibid.*). Petitioner responded with timely filed objections to the election, alleging that the Union had impermissibly interfered with the employees' free choice by offering to waive initiation fees for those employees who signed authorization cards before the election and by attempting to intimidate employees who intended to vote against union representation (through threats of physical harm, racial slurs, and false accusations of criminal wrongdoing) (*id.* at 2a, 28a-29a).

At the hearing held to resolve these objections, petitioner relied almost exclusively on the testimony of two employees—Roger Curry and Jimmy Hudson. Curry testified (Pet. App. 24a) that, approximately one week after the Union filed its representation petition, another unit employee, Lewis Burton, told him that "if he did not sign [an authorization] card, it would cost him $150 and if he did it would cost him $10," and that, on another occasion, yet another unit employee, Jimmy Burton, asked him to sign an au-

thorization card and told him that it "would come out cheaper if he signed a card." Hudson testified that, while he was working on a truck at petitioner's shop one day, he heard some drivers say to each other that those employees who "did not sign a card now would have to pay $100 later on" (*ibid.*). Finally, Curry, who is black, testified that, after he refused to sign an authorization card, he began hearing racial "slurs" over the CB radio in his truck (*id.* at 6a); that he overheard two other unit employees discussing the need to "get rid of the nigger" and to bring in the "Ku Klux Klan in Louisville" to "do away with [him]" (*id.* at 6a-7a); that he found the words "nigger sucks Scotty" written in the dust on the ticket box where he picked up the papers for his load (*id.* at 7a); that a bag of marijuana had been planted in his truck (*ibid.*); and that another employee named Tom Cox had warned him not to vote in the election at all if he did not intend to vote for the Union (*ibid.*).

Much of this testimony was contradicted or undermined, however, by other statements that Curry and Hudson made or by the testimony of other witnesses. For example, in response to a question of the hearing officer, Curry testified that "no one had told him it would be cheaper to sign a card now as opposed to later" (Pet. App. 25a), and that only "Lewis Burton [had] made comments to him about how much it would cost" to sign an authorization card (*ibid.*). Moreover, Curry testified that no racial "slurs" had been directed to him personally (*id.* at 29a), that the substance found in his truck had never been confirmed by tests to be marijuana (*id.* at 7a, 31a), that the incident was never reported to the police (*ibid.*), and that he had voted in the secret ballot election (*id.* at 34a). Hudson, in turn, testified that he could not

identify the individuals in the shop who allegedly had said that initiation fees would be waived for employees signing cards and that no one had ever asked him to sign an authorization card (*id.* at 5a). Finally, Lewis Burton denied having made any of the statements attributed to him by Curry (*ibid.*); Jimmy Burton and Tom Cox denied that Lewis Burton had said anything to them about a waiver of initiation fees (*ibid.*); Jimmy Burton denied having made the statements attributed to him by Curry (*ibid.*); and Charles Priddy, an assistant president of the Union, testified that he had conducted only two official meetings during the organizational campaign, that he had told attendees of these meetings that dues and fees would be the same for all employees whether they signed authorization cards or not, and that he had never authorized any employee to speak for or otherwise to represent the Union (*id.* at 5a, 25a).

2. Based on this testimony and the demeanor of the witnesses, the hearing officer rejected petitioner's objections to the election (Pet. App. 22a-35a). The hearing officer found that, in contrast to Priddy's testimony, Curry's testimony about the statements allegedly made concerning the cost of joining the union was "contradictory," "confused" and "less than credible" (*id.* at 25a).[1] She similarly found that

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[1] Moreover, she found (Pet. App. 26a-28a) that, "[e]ven if * * * [Curry's] testimony [as to a waiver offer] were credited," there was no evidence that any of the alleged statements concerning the cost of joining the union were made by agents of the union; to the contrary, she found that the union had "clearly stated its valid policy regarding initiation fees" and therefore that, in any event, the alleged statements by Lewis and Jimmy Burton were not sufficient ground for overturning the results of the election.

Curry's testimony concerning the threats and racial slurs he allegedly heard over his CB radio was not credible (*id.* at 31a-33a). In any event, she concluded that the alleged threats were " 'not of such [a] nature as would have tended to make a free election improbable' " (*id.* at 33a);[2] that petitioner's remaining allegations of objectionable conduct were "too trivial and speculative to warrant serious consideration" (*ibid.*);[3] and that, "[w]hile the use of [racial slurs] * * * is not commendable, it is common and there was no testimony that any 'slurs' were ever linked directly to any employee's support for or opposition to the * * * [Union]" (*ibid.*). Thus, she con-

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[2] The hearing officer noted (Pet. App. 32a) that the alleged threat was isolated, remote in time from the election, and outside the " 'critical period' " between the filing of the petition and the casting of votes by the employees. She further noted (*ibid.*) that the alleged threat was never reported to the police and that there was no evidence that petitioner "had ever attempted to discipline or restrain" the alleged participants. She also noted (*id.* at 32a-33a) that the alleged threat was not made in person, did not refer to Curry by name, and was not communicated to other employees. Finally, she emphasized (*id.* at 33a) that there was no testimony by Curry or anyone else linking the threat to the union's organizing drive and that Curry had testified that it "did not discourage him from openly voicing his opposition to the Union or from voting."

[3] The hearing officer said (Pet. App. 33a) that it was "ridiculous" to suggest that the union "could be found responsible for a substance, which was never conclusively identified as marijuana, being planted in Curry's truck." Moreover, she credited (*id.* at 33a) the representations of Cox and Burton that they had not placed the alleged marijuana in Curry's truck. Finally, she found (*id.* at 34a) that Cox's alleged statement to Curry that he should not vote at all unless he intended to vote for the union "does not constitute objectionable conduct."

cluded that the "pre-election conduct which was established by * * * [petitioner] could not have realistically created an atmosphere requiring the election to be set aside" and recommended that the Board overrule petitioner's objections and certify the Union (*id.* at 34a).

3. On review of petitioner's exceptions, the Board adopted the hearing officer's findings and issued the recommended certification (Pet. App. 20a-21a).[4] But petitioner refused to bargain with the Union (*id.* at 2a). Accordingly, the General Counsel issued a complaint alleging that petitioner had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), by its refusal to bargain (Pet. App. 2a). On motion for summary judgment, the Board found that petitioner had indeed committed the alleged violations and directed petitioner to bargain with the Union on request (*id.* at 12a-16a).

4. In a per curiam opinion, the court of appeals affirmed the Board's decision and enforced its order (Pet. App. 1a-10a). Initially, the court stated that "'[t]he only question presented on judicial review is whether the Board has reasonably exercised its discretion in the matter'" (Pet. App. 3a (citation omitted)) and that, in resolving this issue, "[t]he Board's findings of fact are conclusive 'if supported by substantial evidence on the record considered as a whole'" (*ibid.*, quoting 29 U.S.C. 160(e)). It then turned to the record and found that, since "[t]he hearing officer was faced with conflicting [evidence] as to whether an offer of a waiver of initiation fees

[4] The Board upheld the hearing examiner's credibility findings and found "it unnecessary to pass on [her] alternative discussion based on her agency findings" (Pet. App. 20a n.1).

had been made," "the Board's finding that no offer to waive initiation fees was made is supported by substantial evidence" and deserving of judicial deference (Pet. App. 6a).[5] And it further agreed with the Board's finding that petitioner had failed "to prove that the coercive acts actually occurred"[6] or that "these acts interfered with the employees' choice and affected the outcome of the election" (*id.* at 9a).[7] Accordingly, it held that "[t]he Board's conclusion that the election should not be set aside is supported by substantial evidence" and granted the petition for enforcement (*id.* at 10a).

## ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

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[5] Like the Board, the court of appeals saw no need to determine whether the employees who had allegedly said that initiation fees would be waived for employees signing authorization cards or who had allegedly threatened other employees were agents of the Union (Pet. App. 6a).

[6] The court reviewed the conflicting testimony concerning the allegedly coercive or intimidating acts and observed that "[t]he hearing officer, who heard testimony on both sides of the issue, chose not to credit Curry's testimony" (Pet. App. 9a). The court found the hearing officer's conclusion to be reasonable "[i]n light of the fact that no one corroborated Curry's testimony or heard what Curry claimed was said" (*ibid.*).

[7] The court noted (Pet. App. 9a) that "Curry himself, the supposed target of these alleged threats, testified that on election day he 'just walked in and voted,' [and] [n]o other employee testified that his or her vote was affected by these alleged threats."

1. It is settled law that the Board has a "wide degree of discretion" in its regulation of the conduct of representation elections. *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). It is further settled that the Board will set aside an election decision only where the objecting party shows by specific evidence both that improper conduct has occurred and that the atmosphere created has so impeded the employees' free choice that the result of the election was materially affected. See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961). In this case, the court below found substantial evidence to support the Board's conclusion that most of the union misconduct alleged by petitioner did not in fact occur; that is, the record supported the Board's findings that the Union had not offered to waive initiation fees for employees who signed authorization cards and that the Union had not threatened employee Curry with retaliation for his pro-company stance or planted marijuana in Curry's truck. The court of appeals also found substantial support for the Board's conclusion that the remaining conduct alleged to be objectionable—*i.e.*, racial "slurs" not directly linked to the election campaign and Cox's statement to Curry that he should not vote at all unless he voted for the union—did not create an atmosphere that could realistically be viewed as interfering with employee free choice. Accordingly, the court below correctly affirmed the Board's exercise of its "wide discretion" in refusing to set aside the results of this election.

2. Petitioner contends (Pet. 7-12) that this Court should grant certiorari to resolve a conflict among the circuits concerning whether the Board's decisions in election certification cases should be judged by the

" 'substantial evidence' " or " 'abuse of discretion' " standard. There is no merit to this contention.

Initially, we note that the matter on which the courts of appeals differ is much narrower than petitioner suggests. The courts uniformly hold that the rules that the Board has devised for regulating the conduct of representation elections should be judged under the "abuse of discretion" standard. See, *e.g.*, *NLRB* v. *A.J. Tower Co.*, 329 U.S. at 330; *NLRB* v. *L & J Equipment Co.*, 745 F.2d 224, 230-231 (3d Cir. 1984); *NLRB* v. *State Plating & Finishing Co.*, 738 F.2d 733, 736-738 (6th Cir. 1984); *Mosey Mfg.* v. *NLRB*, 701 F.2d 610, 615 (7th Cir. 1983) (en banc). The courts are also uniform in holding that the Board's findings concerning whether allegedly improper conduct has actually occurred should be judged under the "substantial evidence" standard. See, *e.g.*, *NLRB* v. *State Plating & Finishing Co.*, 738 F.2d at 736-738; *Mosey Mfg.* v. *NLRB*, 701 F.2d at 613-615 (7th Cir. 1983); *Jamesway Corp.* v. *NLRB*, 676 F.2d 63, 67-68 n.5 (3d Cir. 1982). The only point on which they differ is whether the Board's ultimate decision that alleged misconduct is or is not sufficiently coercive to warrant the setting aside of an election should be reviewed under a substantial evidence or abuse of discretion standard. Compare *Mosey Mfg.* v. *NLRB*, 701 F.2d 610 at 615 (substantial evidence standard); and *N.L.R.B.* v. *L & J Equipment, Inc.*, 745 F.2d at 231 (same) with *NLRB* v. *S. Prawer & Co.*, 584 F.2d 1099, 1101 (1st Cir. 1978) (abuse of discretion standard); *Schneider Mills, Inc.* v. *NLRB*, 390 F.2d 375, 387 (4th Cir. 1968) (same). See also *NLRB* v. *Big Three Industries, Inc.*, 602 F.2d 898, 901 (9th Cir. 1979) (treating abuse of discretion standard as synonymous with

lack of substantial evidence in this context); *Bausch & Lomb, Inc.* v. *NLRB*, 451 F.2d 873, 876, 877 & n.6 (2d Cir. 1971) (same); *LaCrescent Constant Care Center, Inc.* v. *NLRB*, 510 F.2d 1319, 1324 (8th Cir. 1975) (same).

This case is not an appropriate vehicle for resolving the difference. Petitioner does not contend that a different result would have obtained in this case had the court below applied one standard of review rather than the other standard of review. Indeed, petitioner reads (Pet. 7) the decision below (as do we) as evaluating petitioner's claims under both standards of review and as finding that the Board's order was enforceable under either standard. Since the outcome of this case would not be affected at all by the choice between possible standards of review, the case is plainly not an appropriate vehicle for making such a choice.[8]

3. Petitioner mischaracterizes the decision below in suggesting (Pet. 12-14, 14-15) that the Sixth Circuit held it to an incorrect standard of proof. Contrary to petitioner's suggestion, the court below did not hold that an election may be overturned only on the basis of evidence that coercive acts interfered with employee free choice. The court had no occasion to consider whether an election could be overturned on the basis of " 'other elements which prevent or impede a reasoned choice' " (*ITT* v. *NLRB*, 712 F.2d 40, 45 (2d Cir. 1983) (citation omitted)), because petitioner alleged only that certain conduct, including

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[8] Petitioner's assertion of an intra-circuit conflict in the Sixth Circuit, even if true, provides no basis for review by this Court. See *Wisnieski* v. *United States*, 353 U.S. 901, 902 (1957).

the racial slurs, was intimidating of employees (Pet. App. 28a, 29a).[9] And, again contrary to petitioner's suggestion, the court below assessed the record as a whole in determining that substantial evidence supported the Board's conclusion that petitioner had failed to show that the election in this case was conducted in an atmosphere that impeded free and reasoned choice. Petitioner's real complaint is that the court affirmed the Board's finding with respect to these issues,[10] but such fact-bound questions raise no issue warranting review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

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[9] By contrast, in *ITT* v. *NLRB*, 712 F.2d 40, 44 (2d Cir. 1983), it was alleged that promises of benefits made by pro-union supervisors had improperly influenced the election's outcome. Similarly, in *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 70 (1962), it was alleged that appeals to racial prejudice as a reason for voting for one party in the election had impeded free choice.

[10] Thus, petitioner claims (Pet. 15) that the court below "failed to address the fact that substantial evidence * * * ignored by, the Hearing Officer * * * included an employee's advance knowledge that pro-Union employees planned to plant marijuana in the truck of a black employee who opposed the Union and the fact that Ku Klux Klan references and racial slurs were made on Company truck radios after the filing of the Petition." But the "evidence of advance knowledge" to which petitioner refers is Curry's testimony concerning a statement by the blacktop operator, testimony that the hearing officer refused to credit and thus was rejected by both the Board and the court below. See Pet. App. 33a-34a, 20a, 6a-9a. Likewise, the hearing officer, the Board, and the court below evaluated the testimony concerning the alleged racial "slurs" and all found that, even if credited, it did not establish that the election was conducted in an environment that impeded free choice. See *id.* at 31a-34a, 20a, 6a-9a.

4. Petitioner similarly errs in contending (Pet. 15-17) that, in light of the Board's decision in *Davlan Engineering, Inc.*, 283 N.L.R.B. No. 124 (Apr. 30, 1987),[11] the Court should grant certiorari to address whether the employees who handed out authorization cards were agents of the union. While the hearing officer did hold, in the alternative, that the employee statements concerning fee waivers were not attributable to the Union, neither the Board nor the court below reached this issue since they found that the alleged employee statements were never made. See Pet. App. 20a n.1, 6a. Thus, the question that petitioner asks this Court to resolve is not at issue in this case.

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[11] In *Davlan*, the Board, reversing prior precedent, held that "in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting" (slip op. 6).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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